Supreme Court, U.S.
FILED
MAY 3 1999
OFFICE OF THE CLERK

No. 98-1533

IN THE

Supreme Court of the United States

CHARLES J. HYNES, as District Attorney of Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the Supreme Court of the State of New York, County of Kings, and MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN, as District Attorney of Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the County Court, Monroe County, State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General of the State of New York,

Intervenor-Petitioner.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

REPLY BRIEF FOR PETITIONERS

CHARLES J. HYNES
District Attorney
Kings County, State of New York
JONATHAN FRANK*
350 Jay Street
Brooklyn, New York 11201
(718) 250-2000

KEITH DOLAN
HOWARD A. GETZLER
Assistant District Attorneys
Of Counsel

* *Counsel of Record for Petitioners*
(Additional Counsel listed on inside cover)

13PP

HOWARD R. RELIN
District Attorney
Monroe County, State of New York
WENDY EVANS LEHMANN
Assistant District Attorney
Of Counsel
Ebenezer Watts Building
Suite 832
Rochester, New York 14614
(716) 428-5680

ELIOT L. SPITZER
Attorney General of the
State of New York
Intervenor-Petitioner
The Capitol
Albany, New York 12224
(518) 474-7330

TABLE OF CONTENTS

	Page
Petitioners' Reply to Briefs in Opposition	1
A. This Court Should Reexamine *United States v. Jackson* and Determine Whether it is Applicable to Modern Capital Statutes.	1
B. The Decision of the New York Court of Appeals Has Impeded the Functioning of Capital Punishment and Plea Bargaining in Capital Cases.	6
Conclusion	9

TABLE OF CITED AUTHORITIES

Cases:

Baker v. State, 310 Ark. 223, 884 S.W.2d 603 (1994)	1
Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)	1
Corbitt v. New Jersey, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978)	3, 4
Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)	2, 5, 8
Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)	2

Cited Authorities

Page

Matter of Hynes v. Tomei, 92 N.Y.2d 613, 684 N.Y.S.2d 177 (1998). 6, 8

McCleskey v. Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) 8

Parrish v. Fulcomer, 150 F.3d 326 (3d Cir. 1998) 1

People v. David Van Dyne, 1999 N.Y. Misc. LEXIS 11 (N.Y. Co. Ct., Monroe County, Jan. 20, 1999) 8

People v. Kendall Francois (N.Y. Co. Ct., Dutchess County, Feb. 11, 1999) 6, 7

Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976) 2

Pulley v. Harris, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984) 5

Ruiz & Denton v. State, 275 Ark. 410, 630 S.W.2d 44, *cert. denied*, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982) 1

United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1211, 20 L. Ed. 2d 138 (1968) ..... *passim*

Cited Authorities

Page

Statutes:

N.Y. Crim. Proc. Law § 220.10(2) 6

N.Y. Crim. Proc. Law § 250.40(2) 7

N.Y. Crim. Proc. Law § 250.40(4) 8

Other Authority:

Douglas A. Poe, *Capital Punishment Statutes In The Wake of United States v. Jackson: Some Unresolved Questions*, 37 Geo. Wash. L. Rev. 719 (1969) 2

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

A. This Court Should Reexamine *United States v. Jackson* and Determine Whether it is Applicable to Modern Capital Statutes.

Employing circular reasoning, respondents argue that *certiorari* should be denied. In their view, because the New York Court of Appeals felt constrained to apply the rule of *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1211, 20 L. Ed. 2d 138 (1968) to a bifurcated capital statute — something that this Court has never done — *Jackson*'s viability in modern capital jurisprudence should not be reexamined. The viability of *Jackson* in the modern capital era is the precise issue that this Court should examine. Notwithstanding respondents' arguments to the contrary, this Court's post-*Jackson* jurisprudence regarding plea bargaining has eroded *Jackson*'s legal underpinnings. *See, e.g., Baker v. State*, 310 Ark. 223, 225, 884 S.W.2d 603, 604 (1994); *Ruiz & Denton v. State*, 275 Ark. 410, 630 S.W.2d 44, *cert. denied*, 459 U.S. 882, 103 S. Ct. 181, 74 L. Ed. 2d 148 (1982); *see also Parrish v. Fulcomer*, 150 F.3d 326, 328 (3d Cir. 1998) ("The [Supreme] Court expressly limited *Jackson* two years later in *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 [1970]"). In light of the legally and logically unsound consequences that result from applying *Jackson* to modern bifurcated capital statutes, *Jackson* should be either overruled or expressly limited by this Court.

Underlying respondents' argument is the theme that, even under a bifurcated capital statute, a capital defendant nonetheless risks a different maximum punishment if he or she declines to plead guilty and proceeds to trial. That argument begs the issue presented by the petition. For *Jackson* involved a *unitary* capital statute, without separate

guilt and penalty phases. This Court has never decided whether *Jackson* should also apply to a post-*Gregg bifurcated* capital punishment statute, by which a defendant can exercise the right to a jury trial on the issue of guilt or innocence, and still agree to accept a sentence of less than death after a conviction.[1] One commentator has noted that *Jackson* was motivated by the dilemma this Court faced, over thirty years ago, concerning the propriety of judicial abolition of capital punishment as it then existed. *See* Douglas A. Poe, *Capital Punishment Statutes In The Wake of United States v. Jackson: Some Unresolved Questions*, 37 Geo. Wash. L. Rev. 719, 744-45 (1969). Several years later, of course, this Court resolved the general question of whether capital punishment is constitutional. *See Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Thus, *Jackson*'s viability with respect to modern capital jurisprudence should be examined.

Respondents completely overlook the gravamen of the petition. In the years since *Jackson* was decided, this Court has repeatedly and expressly endorsed plea bargaining in criminal cases, notwithstanding that defendants would be faced with a difficult choice of risking more severe punishment by asserting their trial rights. Yet in *Jackson*, this Court appears to have held that the imposition of these same choices is constitutionally impermissible when they are authorized by statute.[2]

---

1. A capital defendant has no federal constitutional right to a jury trial at a sentencing or penalty phase. *See Lockett v. Ohio*, 438 U.S. 586, 603, 98 S. Ct. 2954, 2964, 57 L. Ed. 2d 973 (1978); *Proffitt v. Florida*, 428 U.S. 242, 252, 96 S. Ct. 2960, 2966, 49 L. Ed. 2d 913 (1976).

2. Respondents maintain that *Jackson* was not an "anti-plea bargaining" case. Yet the practical effect of *Jackson*, as evidenced by the Court of Appeals' decision, is "anti-plea bargaining."

Thus, *Jackson* and this Court's post-*Jackson* jurisprudence cannot in logic or in law be reconciled. *Jackson* prohibits confronting a defendant with the risk of a death sentence when disparate penalties are authorized for the same crime by statute. In contrast, the cases culminating with *Corbitt v. New Jersey*, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978), permit a defendant to risk a more severe penalty by exercising constitutional trial rights, since, as a practical matter, plea bargaining necessarily involves the risk of a defendant being subject to more severe punishment by asserting the same constitutional trial rights. Plea bargaining negotiations invariably present defendants with a choice between pleading guilty to a lesser crime with a less severe punishment or standing trial for a greater crime with a more severe maximum punishment. Respondents do not and could not seriously contend that such a choice violates *Jackson*. Yet, taking *Jackson*'s rationale to its logical conclusion, any statutory framework which presents the possibility of disparate maximum sentences depending on whether the defendant asserts constitutional trial rights should violate *Jackson*, even if the punishments are for different crimes or degrees of crimes.

Respondents attempt to explain away this legal incongruity by claiming that although a prosecutor could accomplish a plea bargain which has the identical effect of providing the defendant with the possibility of avoiding the death penalty by pleading guilty, the legislature cannot statutorily provide for the same result. *See* Respondent Connell's brief in opposition at 16-17; Respondents Hale and Mateo's brief in opposition at 5-6. Thus, a statutory disparity in the power to punish is unconstitutional under *Jackson*; yet a practical disparity in the power to punish, which is the linchpin of plea bargaining as explained by

this Court after *Jackson* is constitutional. *Corbitt*, however, explicitly held that just as a prosecutor can charge a defendant with the maximum level of offense and secure a conviction, despite the prosecutor's power to offer a reduced plea, the legislature may also "openly provide for the possibility of leniency in return for a plea." 439 U.S. at 224, 99 S. Ct. at 498.

Respondents Hale and Mateo state in their brief in opposition (page 7) that

> [t]rue plea-bargaining contemplates, as a necessary element, that a defendant will be faced with the difficult choice whether to risk a more severe punishment by pleading not guilty.

Yet their entire argument is that *Jackson* holds that the Constitution prohibits a statutory scheme which does just that. Respondents Hale and Mateo thus completely undercut their argument that *Jackson* and this Court's post-*Jackson* jurisprudence relating to plea bargaining are in harmony. Petitioners ask this Court to reconcile this inconsistency by reexamining the legal underpinnings of the *Jackson* precedent in light of the "sea change" in capital jurisprudence since the time of *Jackson*.

Again, employing circular logic, respondents claim that because the Court of Appeals concluded that only this Court could determine that *Jackson* was satisfied by a bifurcated capital statute, it is unnecessary for this Court to address the issue. This again begs the question of how a state may devise a capital statutory scheme which comports with *Jackson*: May a state enact a bifurcated scheme that affords a capital defendant the opportunity to exercise constitutional trial rights and still negotiate an agreement for a sentence less than death? Or, must a capital statute provide for the

possibility of a death sentence regardless of how guilt was determined or prohibit guilty pleas in capital cases unless the death penalty is waived? *Jackson* left this exact question open for future consideration. The issue is now squarely before this Court.

Respondents also argue that because most other jurisdictions have elected a different way of dealing with *Jackson*, New York's statute must be wrong. Merely because most jurisdictions that have enacted capital punishment laws have chosen one method of complying with *Jackson* does not render that method the sole constitutional way of doing so. *See Pulley v. Harris*, 465 U.S. 37, 44-45, 104 S. Ct. 871, 876, 79 L. Ed. 2d 29 (1984) ("We take statutes as we find them. To endorse the statute as a whole is not to say that anything different is unacceptable"); *Gregg v. Georgia*, 428 U.S. at 195, 96 S. Ct. at 2935 ("We do not intend to suggest that only the above-described procedures [regarding capital punishment] would be permissible"). This Court did not hold in *Jackson* that there are one or two exclusive methods by which a state's capital punishment law can pass constitutional scrutiny. New York has fashioned a plea statute that adopts two constitutional provisions: a provision that permits negotiated plea bargains, and a provision, specifically found constitutional in *Jackson*, that mandates a jury trial in all capital cases. The New York Court of Appeals felt constrained to strike this amalgam of constitutional provisions. But, the Court of Appeals invited this Court to address the issue, and so do Petitioners.

B. The Decision of the New York Court of Appeals Has Impeded the Functioning of Capital Punishment and Plea Bargaining in Capital Cases.

Contrary to respondents Hale and Mateo's contention (Brief in Opposition, page 4), the decision of the New York Court of Appeals has had an adverse impact on the functioning of capital punishment in New York. New York defendants, who could not plead guilty without the approval of the prosecution and the court under the capital guilty plea provisions, may now plead guilty as of right to an entire indictment which includes a charge of first degree murder, without court or prosecutorial approval pursuant to N.Y. Crim. Proc. Law § 220.10(2). A defendant may thus completely avoid a potential capital sentence by pleading guilty to first degree murder charges after an indictment has been filed but before the prosecution has the opportunity to decide whether to file a notice of intent to seek the death penalty, regardless of individual circumstances.[3] Hence, the remedy fashioned by the Court of Appeals presents a far greater risk of "needlessly" encouraging guilty pleas in capital murder cases by providing potential capital defendants with the opportunity to hastily plead guilty to the entire indictment before the prosecutor can determine whether capital punishment is appropriate.

In the case of *People v. Kendall Francois* (N.Y. Co. Ct., Dutchess County, Feb. 11, 1999), the defendant was

---

3. Indeed, the Court of Appeals may well have encouraged more guilty pleas by capital defendants than allegedly would occur had the capital guilty plea provisions been upheld, in authorizing guilty pleas by capital defendants to crimes other than first degree murder, even though the notice of intent to seek the death penalty is not withdrawn. *Matter of Hynes v. Tomei*, 92 N.Y.2d 613, 629, 684 N.Y.S.2d 177, 185 (1998).

charged with the murders of eight women. On December 23, 1998, the day after the Court of Appeals' decision, the defendant's attorneys demanded that the defendant be brought to court, even though his case was not on the court's calendar, solely to enter a guilty plea to the entire indictment, and thus, avoid a potential death sentence. On December 24, 1998, the Dutchess County District Attorney filed a notice of intent to seek the death penalty, even though he had previously announced that he would not decide whether to do so until January of 1999.[4] The defendant's post-notice application to plead guilty to the indictment as of right was not effectuated.[5] However, had the Court of Appeals not applied *Jackson* and upheld the capital guilty plea provisions, *Francois* could not have attempted to avoid a potential death sentence by hastily attempting to plead guilty to the indictment as of right. The District Attorney would not have been prematurely forced to seek the death penalty. The parties would, in any case, have remained free to consider negotiating a plea of guilty to first degree murder in exchange for a sentence of life without parole, which the Court of Appeals' ruling has determined to be unconstitutional.

Two other cases which postdate the Court of Appeals' decision also illustrate its far-reaching effect. In *People v. Nicholson McCoy*, the Suffolk County District Attorney filed a notice of intent to seek the death penalty on December 23, 1998, one day after the Court of Appeals' decision.

---

4. Under New York law, a prosecutor has 120 days from the date the defendant is arraigned on an indictment charging first degree murder to determine whether to seek the death penalty. N.Y. Crim. Proc. Law § 250.40(2).

5. A copy of the unreported decision of the Dutchess County Court in *Francois* will be provided to this Court upon request.

McCoy confirms the Court of Appeals' prediction that striking the plea provisions "may well have an ironic twist in that capital defendants will have fewer opportunities to avoid the possibility of the death penalty." *Matter of Hynes v. Tomei*, 92 N.Y.2d at 629, 684 N.Y.S.2d at 185.

In *People v. David Van Dyne*, 1999 N.Y. Misc. LEXIS 11 (N.Y. Co. Ct., Monroe County, Jan. 20, 1999), the court accepted a conditional plea to a charge of first degree murder in exchange for a sentence of life imprisonment without parole. The prosecutor agreed to withdraw the notice of intent to seek the death penalty. However, the notice could be reinstated if the defendant either withdrew his plea or otherwise failed to abide by the terms of the agreement. Since New York law prohibits a prosecutor from refiling a notice of intent to seek the death penalty once it is withdrawn, *see* N.Y. Crim. Proc. Law § 250.40(4), it is far from clear whether such conditional plea arrangements would be upheld on appeal. Had the Court of Appeals not applied *Jackson* to the plea provisions, however, a conditional plea arrangement would not have been necessary in *Van Dyne*.

Respondents have thus misconstrued the role that the capital guilty plea provisions play in the administration of capital cases in New York. The provisions allow for individualized, case-by-case prosecutorial discretion and plea bargaining after a notice of intent to seek the death penalty has been filed, in cases where it becomes apparent that capital punishment is inappropriate.[6] The Court of

---

6. This Court has observed that "a capital punishment system that did not allow for leniency 'would be totally alien to our notions of criminal justice.' " (*McCleskey v. Kemp*, 481 U.S. 279, 312, 107 S. Ct. 1756, 1778, 95 L. Ed. 2d 262 (1987); *Gregg v. Georgia*, 428 U.S. at 153, 200, n.50, 96 S. Ct. 2909, 2938, n.50).

Appeals has eliminated this discretion, unless the prosecutor withdraws the notice of intent to seek the death penalty or permits the defendant to plead guilty to a crime other than Murder in the First Degree.

CONCLUSION

For the reasons stated above and in the petition, this Court should grant the writ of *certiorari* to review the decision and judgment of the Court of Appeals of the State of New York and decide the important constitutional issues presented by this case.

Respectfully submitted,

CHARLES J. HYNES
District Attorney
Kings County, State of New York
JONATHAN FRANK*
KEITH DOLAN
HOWARD A. GETZLER
Assistant District Attorneys
Of Counsel
350 Jay Street
Brooklyn, New York 11201
(718) 250-2000

HOWARD R. RELIN
District Attorney
Monroe County, State of New York
WENDY EVANS LEHMANN
Assistant District Attorney
Of Counsel
Ebenezer Watts Building
Suite 832
Rochester, New York 14614
(716) 428-5680

ELIOT L. SPITZER
Attorney General of the
State of New York
Intervenor-Petitioner
The Capitol
Albany, New York 12224
(518) 474-7330

* *Counsel of Record for Petitioners*